IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
January 2007 Session

SEAN EARL JONES v. STATE OF TENNESSEE

Appeal as of Right from the Circuit Court for Rutherford County
No. F-56817 Don R. Ash, Judge

No. M2006-00664-CCA-R3-PC - Filed April 20, 2007

The Petitioner, Sean Earl Jones, pled guilty to two counts of possession with the intent to sell less than one-half gram of cocaine. The Petitioner petitioned for post-conviction relief claiming that his guilty plea violated the state and federal constitutional prohibitions of double jeopardy and that his trial counsel was ineffective. The State asserts the Petitioner waived his right to claim double jeopardy, and, alternatively, his claim is without merit. Additionally, the State asserts that the Petitioner's trial counsel was not ineffective. After a thorough review of the record and applicable law, we conclude the Petitioner was not denied the effective assistance of counsel, and he has waived his double jeopardy claim for post-conviction purposes. Thus, we affirm the judgment of the post-conviction court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

ROBERT W. WEDEMEYER, J., delivered the opinion of the court, in which DAVID H. WELLES and, THOMAS T. WOODALL, JJ., joined.

Brad W. Hornsby and Kerry Knox (on appeal), Murfreesboro, Tennessee, and Sean Williams (at hearing), Murfreesboro, Tennessee, for the Appellant, Sean Earl Jones.

Robert E. Cooper, Jr., Attorney General and Reporter; Blind Akrawi, Assistant Attorney General; William C. Whitesell, District Attorney General; Jenning Jones, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

I. Facts

This appeal arises from a denial by the post-conviction court of the Petitioner's petition for post-conviction relief. The Petitioner pled guilty to two counts of possession with the intent to sell less than .5 grams of cocaine. The facts making up the basis for the guilty pleas, offered on April 14, 2005, were stated by the State as follows:

The Petitioner was charged with "sale of cocaine, felony possession of cocaine, evading arrest with an automobile, felony possession of marijuana, reckless endangerment with a motor vehicle, coercion of a witness, and possession of drug paraphernalia." Those charges arose from a drug transaction wherein a confidential informant, at the direction of Rutherford County Sheriff's Department, bought cocaine from the Petitioner. At the conclusion of the transaction, the Sheriff's Department approached the Petitioner with the intent to arrest him. The Petitioner pulled away from the scene in his car, with the confidential information partially in the car. Subsequently, the Petitioner "made threats to prevent [the] informant from coming into court."

The State explained to the trial court that "in 56817 count one to charge of possession of cocaine over .5 grams the defendant would be entering a plea of possession under .5 grams . . . ." Additionally, "in 56817 count two to the charge of possession of cocaine over .5 grams the defendant would be entering a plea of guilty to the offense of possession of cocaine under .5 grams." The remaining counts were dismissed. The trial court questioned the Petitioner to determine whether the plea was entered knowingly, voluntarily, and intelligently. Satisfied, the trial court entered judgments on two counts of the sale of cocaine less than .5 grams of cocaine.[1]

The Petitioner filed a post-conviction petition alleging that he received the ineffective assistance of counsel when his attorney told him that the trial court would not allow him to present a defense of entrapment. Additionally, he alleged that his two convictions for possession with the intent to sell under .5 grams of cocaine violated the double jeopardy clause of the Tennessee and United States Constitutions. A hearing was conducted on the matter, and the following evidence was presented:

The Petitioner testified that he was on parole in Rutherford County and resided in Davidson County at the time of the drug transaction that lead to his plea. He was employed as a house framer, and he was contacted by an informant wanting to purchase drugs. The informant was a friend of the Petitioner's roommate who, out of the blue, came to the Petitioner and asked him: "can you get me some cocaine?" The Petitioner responded, "Yes, I know where to get some cocaine, but I'm not involved in that any more. And, you know, I'd really have to think about this. I don't really want to partake in that." The informant called the Petitioner the next day on his cell phone, again asking for cocaine. The informant never responded when the Petitioner asked her how she obtained his cell phone number. The Petitioner testified that he had served several years in the Penitentiary for selling cocaine, and he simply blew off the informant because he was no longer involved in drugs. The informant called another five to eight times, and, finally, the Petitioner agreed to sell her cocaine.

The Petitioner testified that he told his trial counsel ("Counsel") about these conversations

[1]The record reflects and the State acknowledges confusion as to what exactly the Petitioner pled guilty. The Petition to Enter Plea of Guilty states that the Petitioner was pleading guilty to the sale of cocaine and felony possession of cocaine. The State advised the trial court that the guilty plea was to two counts of the possession of less than one-half gram of cocaine. The trial court repeatedly stated that the *nolo contrendere* plea was to two counts of the possession of more than one-half gram of cocaine, and judgments were entered to that effect. The judgments were later amended to reflect a plea of *nolo contrendere* to two counts of possession with the intent to sell less than one-half gram of cocaine.

because he believed he may have an entrapment defense. However, Counsel told him that the trial court was not "going to rule in your favor. He's not going to dismiss the case on entrapment." Because of this, the Petitioner stated he felt as though he did not have any choice but to negotiate a plea. The Petitioner stated that he never saw any evidence against him, and, in attempting to discuss his case, Counsel said, "Oh, well, I'll take care of it." The Petitioner admitted that he told the court he was satisfied with Counsel's representation, but he stated he did not know he could bring up the entrapment defense issue. The Petitioner also claimed that he was in jail for forty-five days before he was allowed to see a judge or speak with an attorney.

With respect to the double jeopardy claim, the Petitioner testified that he knew nothing about a double jeopardy claim until he got to the penitentiary. The Defendant stated that when he crossed into Rutherford County, the cocaine was in one container.

On cross-examination, the Petitioner testified the sale in question took place on November 3, 2004. The Petitioner drove from Davidson County to Rutherford County to meet the informant by himself. The informant requested three to three and one-half grams, and the Petitioner gave her two and one-half grams, keeping one-half of a gram for himself. The Petitioner stated that when you "short" a customer that person usually does not call you for further purchases. The Petitioner admitted that he had been convicted for selling cocaine in 1998, for which he received a ten-year sentence. He was still on parole for that sentence when he was arrested on these charges. Additionally, the Petitioner admitted he had previously been arrested for theft, evading arrest, burglary, sale of drugs, various crimes of dishonesty, flight and escape, and he had previously violated parole. There were enough previous convictions to classify the Petitioner as a Range II offender, but his attorney was able to obtain a Range I sentence for the Petitioner.

The trial court then examined the Petitioner's testimony at the guilty plea hearing. On re-direct examination, the Petitioner stated that at the time he told the trial court he was satisfied with Counsel's representation, he did not know that he could have raised issue with Counsel's rejection of a potential entrapment defense. After research, the Petitioner learned that there is no law that states that entrapment defenses are not allowed in this particular court.

Counsel testified that, in relation to the possible entrapment defense, he discussed it with the Petitioner, and he gave his opinion of the defense. He felt that, given the circumstances of the offense and the Petitioner's prior conviction for the sale of cocaine, an entrapment defense would not be viable. The State could use the prior conviction to prove a predisposition to commit the offense. Counsel felt he did everything the Petitioner asked of him, but he did not recall if an issue of double jeopardy ever arose.

On cross-examination, Counsel testified that he never told the Petitioner that entrapment was not applicable. He thought that, although it was possible, the likelihood of a successful entrapment defense was not good. No formal discovery request was ever made because the State had an "open file" policy. Counsel testified that the Petitioner did not tell him that the cocaine was all in one container when it was brought into Rutherford County.

The trial court found Counsel's testimony that he advised the Petitioner on the strengths and weaknesses of a potential entrapment defense to be credible. As a result, it found that Counsel was not deficient. The trial court did not address the double jeopardy issue in its written or oral findings.

II. Analysis

On post-conviction appeal, the Petitioner alleges that he was denied the effective assistance of counsel because Counsel improperly advised him that an entrapment defense would not be entertained. Petitioner also alleges that his convictions violate the proscription on double jeopardy in the United States and Tennessee Constitutions. The State responds that advising against an entrapment defense was merely a strategic decision that caused no prejudice. Further, the State submits the Petitioner waived his right to claim double jeopardy because he failed to raise the issue on direct appeal, and alternatively, his convictions do not violate the double jeopardy clauses.

In order to obtain post-conviction relief, a petitioner must show that his or her conviction or sentence is void or voidable because of the abridgment of a constitutional right. T.C.A. § 40-30-103 (2006). The petitioner bears the burden of proving factual allegations in the petition for post-conviction relief by clear and convincing evidence. T.C.A. § 40-30-110(f) (2006). Upon review, this Court will not re-weigh or re-evaluate the evidence below; all questions concerning the credibility of witnesses, the weight and value to be given their testimony and the factual issues raised by the evidence are to be resolved by the trial judge, not the appellate courts. Momon v. State, 18 S.W.3d 152, 156 (Tenn. 1999); Henley v. State, 960 S.W.2d 572, 578-79 (Tenn. 1997). A post-conviction court's factual findings are subject to a de novo review by this Court; however, we must accord these factual findings a presumption of correctness, which can be overcome only when a preponderance of the evidence is contrary to the post-conviction court's factual findings. Fields v. State, 40 S.W.3d 450, 456-57 (Tenn. 2001). A post-conviction court's conclusions of law are subject to a purely de novo review by this Court, with no presumption of correctness. Id. at 457.

A. Assistance of Counsel

The right of a criminally accused to representation is guaranteed by both the Sixth Amendment to the United States Constitution and article I, section 9, of the Tennessee Constitution. State v. White, 114 S.W.3d 469, 475 (Tenn. 2003); State v. Burns, 6 S.W.3d 453, 461 (Tenn. 1999); Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975). The following two-prong test directs a court's evaluation of a claim for ineffectiveness:

> First, the [petitioner] must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the [petitioner] by the Sixth Amendment. Second, the [petitioner] must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the [petitioner] of a fair trial, a trial whose result is reliable. Unless a [petitioner] makes both showings, it cannot be said that the conviction or death sentence resulted from

a breakdown in the adversary process that renders the result unreliable.

Strickland v. Washington, 466 U.S. 668, 687 (1984); State v. Melson, 772 S.W.2d 417, 419 (Tenn. 1989).

In reviewing a claim of ineffective assistance of counsel, this Court must determine whether the advice given or services rendered by the attorney are within the range of competence demanded of attorneys in criminal cases. Baxter, 523 S.W.2d at 936. To prevail on a claim of ineffective assistance of counsel, a petitioner must show that "counsel's representation fell below an objective standard of reasonableness." House v. State, 44 S.W.3d 508, 515 (Tenn. 2001) (citing Strickland, 466 U.S. at 688 (1984)).

When evaluating an ineffective assistance of counsel claim, the reviewing court should judge the attorney's performance within the context of the case as a whole, taking into account all relevant circumstances. Strickland, 466 U.S. at 690; State v. Mitchell, 753 S.W.2d 148, 149 (Tenn. Crim. App. 1988). The reviewing court must evaluate the questionable conduct from the attorney's perspective at the time. Strickland, 466 U.S. at 690; Hellard v. State, 629 S.W.2d 4, 9 (Tenn. 1982). In doing so, the reviewing court must be highly deferential and "should indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Burns, 6 S.W.3d at 462. Finally, we note that a defendant in a criminal case is not entitled to perfect representation, only constitutionally adequate representation. Denton v. State, 945 S.W.2d 793, 796 (Tenn. Crim. App. 1996). In other words, "in considering claims of ineffective assistance of counsel, 'we address not what is prudent or appropriate, but only what is constitutionally compelled.'" Burger v. Kemp, 483 U.S. 776, 794 (1987) (quoting United States v. Cronic, 466 U.S. 648, 665 n.38 (1984)). Counsel should not be deemed to have been ineffective merely because a different procedure or strategy might have produced a different result. Williams v. State, 599 S.W.2d 276, 279-80 (Tenn. Crim. App. 1980). The fact that a particular strategy or tactic failed or hurt the defense does not, standing alone, establish unreasonable representation. House, 44 S.W.3d at 515 (citing Goad v. State, 938 S.W.2d 363, 369 (Tenn. 1996)). However, deference to matters of strategy and tactical choices applies only if the choices are informed ones based upon adequate preparation. House, 44 S.W.3d at 515.

If the petitioner shows that counsel's representation fell below a reasonable standard, then the petitioner must satisfy the prejudice prong of the Strickland test by demonstrating "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694; Nichols v. State, 90 S.W.3d 576, 587 (Tenn. 2002). This reasonable probability must be "sufficient to undermine confidence in the outcome." Id. at 694; Harris v. State, 875 S.W.2d 662, 665 (Tenn. 1994).

We conclude the Petitioner has not met his burden of showing Counsel was deficient. The sole claim relating to the effectiveness of Counsel is that Counsel told the Petitioner a claim of entrapment would most likely not be successful. The Petitioner accepted this advice and pled guilty to the charges. The Petitioner's version of the discussion, that Counsel told him that the trial court

would not even allow a claim of entrapment, was rejected by the trial court. The trial court specifically found Counsel to be credible, and we accept that factual determination. Counsel examined the situation and determined that, because the Petitioner had previously been convicted of the sale of cocaine, the State could show a predisposition. Thus, Counsel determined, it was not in the Petitioner's strategic best interest to make that claim. We agree with the trial court that the Petitioner has not shown that Counsel acted in a deficient manner. The Petitioner is not entitled to relief on this issue.

B. Double Jeopardy

The Petitioner's second allegation of error is that his conviction on two counts of possession with the intent to sell less than .5 grams of cocaine violates the United States and Tennessee Constitutions. See U.S. Const. amends. V, XIV, § 1; Tenn. Const. art. I, § 10. This double jeopardy claim, as made by this Petitioner, is a "stand alone" claim. It was not argued in the context of the effectiveness of his trial counsel or that this affected his knowing, voluntary, or intelligent plea. The State initially responds that the Petitioner has waived this claim due to his failure to raise it on direct appeal.

Although we give the trial court deference in its findings of fact, Butler v. State, 789 S.W.2d 898, 899 (Tenn. 1990), the issue of whether a Petitioner waives a double jeopardy claim by not raising it on direct appeal is a question of law, and we therefore apply de novo review. See Whaley v. Perkins, 197 S.W.3d 665, 670 (Tenn. 2006); Fields, 40 S.W.3d at 457. We first note that there is a potential split of authority on this issue in Tennessee. As stated above, post-conviction relief can be granted when a Petitioner shows by clear and convincing evidence that his sentence is void or voidable because of a violation of a constitutional right. T.C.A. § 40-30-106, -110(f) (2006). However, the Tennessee Code states that:

> A ground for relief is waived if the petitioner personally or through an attorney failed to present it for determination in any proceeding before a court of competent jurisdiction in which the ground could have been presented unless: (1) the claim for relief is based upon a constitutional right not recognized as existing at the time of trial if either the federal or state constitution requires retroactive application of the right; or (2) the failure to present the ground was the result of state action in violation of the federal or state constitution.

T.C.A. § 40-30-106(g) (2006). This Court, in Duke v. State, took the clear and logical reading of the statute and determined that a petitioner, "convicted of two counts of the sale of crack cocaine and one count of possession of crack cocaine with the intent to sell," waived his right to claim this violated his constitutional rights against double jeopardy. Curtis E. Duke v. State, No. M2002-03091-CCA-R3-PC, 2004 WL 578586, at *1 (Tenn. Crim. App., at Nashville, Mar. 22, 2004), *no Tenn. R. App. P. 11 application filed*. This Court reasoned that the Petitioner's failure to allege a double jeopardy violation on direct appeal constituted a waiver of that claim for post-conviction purposes. Id. at *3.

Alternatively, the Court in Jones v. State, decided the same month as Duke, examined a similar set of circumstances and came to a different conclusion. Dexter P. Jones v. State, No. M2003-01229-CCA-R3-PC, 2004 WL 404496, at *1-3 (Tenn. Crim. App., at Nashville, Mar. 4, 2004), *no Tenn. R. App. P. 11 application filed*. In Jones, the Petitioner pled guilty to four assaults and claimed on post-conviction that the trial court's failure to advise him that he was waiving a double jeopardy claim rendered his guilty pleas involuntary, unintelligent, and unknowing. Id. at *1. This Court in Jones examined previous case law and determined that a guilty plea does not waive a double jeopardy claim, and the Court examined the claim on the merits. Id. at *2. In making that determination, the Jones Court examined State v. Rhodes, 917 S.W.2d 708 (Tenn. Crim. App. 1995), and Menna v. New York, 423 U.S. 61 (1975).

In Rhodes, a defendant pled guilty to vehicular assault and driving under the influence. 917 S.W.2d at 710. The Defendant directly appealed his convictions, and the Court noted that the double jeopardy issue was not reserved as a certified question. Id. at 711. However, the Court determined that the issue was not waived and stated, "'Where the State is precluded by the United States Constitution from haling a defendant into court on a charge, federal law requires that a conviction on that charge be set aside even if the conviction was entered pursuant to a counseled plea of guilty.'" Id. (quoting Menna, 423 U.S. at 62).

Menna examined a situation where a defendant pled guilty a second time to contempt of court for failing to answer questions before a grand jury. 423 U.S. at 61. The New York Court of Appeals affirmed the convictions stating that he waived any double jeopardy claim by pleading guilty. Id. at 62. The United States Supreme Court reversed that judgment stating that counseled guilty pleas do waive some "antecedent constitutional violations," but a claim of double jeopardy is not one of them. Id. at 63 n.2. The Supreme Court differentiated between constitutional rights dealing with proof of facts and those which would prevent the defendant from being convicted "no matter how validly his factual guilt is established." Id. The Court went on to further state that, "We do not hold that a double jeopardy claim may never be waived. We simply hold that a plea of guilty does not waive a claim that judged on its face the charge is one which the State may not constitutionally prosecute." Id.

In our view, this line of case law initially stood for the proposition that a guilty plea did not waive a right to claim double jeopardy on direct appeal. This Court, in Jones, took that proposition and applied it to a situation where a post-conviction petitioner claimed his guilty plea was not entered into knowingly, voluntarily, and intelligently and thus his constitutional rights had been violated. Jones stated, "Because a guilty plea does not waive a double jeopardy claim, we must determine whether the petitioner had a double jeopardy claim of which he should have been advised and, if so, did the trial court so advise him." Jones, 2004 WL 404496, at *2. The Jones Court then examined the double jeopardy claim on the merits.

We conclude this case presents a slightly different issue than the Jones line of cases, and we attempt to reconcile the potentially conflicting cases as follows: as in Jones, the Petitioner here failed to raise a claim for double jeopardy on direct appeal. The statute, by its plain language, would then

prevent consideration of the issue at a post-conviction hearing. However, Jones is distinguishable in that the petitioner in Jones presented his double jeopardy argument as a claim that the double jeopardy issue caused a failure of a knowing, voluntary, and intelligent guilty plea. A petitioner's claim that his guilty plea was not entered in accordance with the U.S. or Tennessee Constitution is generally permissible. See, e.g., Chad Davis Trisdale v. State, E2005-02498-CCA-R3-PC, 2007 WL 120047, at *3-4 (Tenn. Crim. App., at Knoxville, Jan. 12, 2007), *no Tenn. R. App. P. 11 application filed*; Christopher Neil Schultz v.State, No. M2005-02464-CCA-R3-PC, 2007 WL 57087, at *5-6 (Tenn. Crim. App., at Nashville, Jan. 5, 2007)*, no Tenn. R. App. P. 11 application filed*. Similarly, an allegation in a petition for post-conviction relief that one was denied the effective assistance of counsel because counsel failed to advise him of a potential double jeopardy violation would be properly reviewable as an ineffective assistance of counsel issue. See Kendricks v. State, 13 S.W.3d 401, 405 (Tenn. Crim. App. 1999). However, the Petitioner here presents his claim as a "stand alone" claim that his convictions constitute a double jeopardy violation, a claim that he did not raise in the trial court or on direct appeal. Thus, it falls squarely within the waiver portion of the statute. We find the statement from Menna instructive: "We do not hold that a double jeopardy claim may never be waived. We simply hold that *a plea of guilty* does not waive a claim that judged on its face the charge is one which the State may not constitutionally prosecute." (emphasis added). Our post-conviction statute does not mandate waiver of a "stand alone" double jeopardy claim based on a guilty plea. Instead, it states that the failure to present such a claim for determination in any proceeding before a court of competent jurisdiction in which the claim could have been presented waives the claim for post-conviction purposes. Accordingly, the Petitioner's double jeopardy claim in the case under submission is waived.

III. Conclusion

In accordance with the foregoing reasoning and authorities, we affirm the judgment of the trial court.

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ROBERT W. WEDEMEYER, JUDGE